

1 LAW OFFICES OF DALE K. GALIPO
2 Dale K. Galipo (Bar No. 144074)
3 dalekgalipo@yahoo.com
4 Eric Valenzuela (Bar No. 284500)
5 evalenzuela@galipolaw.com
6 21800 Burbank Boulevard, Suite 310
7 Woodland Hills, California 91367
8 Telephone: (818) 347-3333
9 Facsimile: (818) 347-4118

10 *Attorneys for Plaintiffs*

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GALE SOSTEK, et al.,
Plaintiffs,

vs.

COUNTY OF SAN BERNARDINO, et
al.,
Defendants.

Case No.: 5:23-cv-2236 MRA (MRWx)

[Honorable Mónica Ramírez Almadani]

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION IN
LIMINE NO. 1 TO EXCLUDE
SPECIFIC ITEMS OF
INFORMATION ACQUIRED
AFTER THE SHOOTING AND NOT
KNOWN TO THE SHOOTING
OFFICER AT THE TIME OF THE
INCIDENT**

[[Proposed] Order; Declaration of Eric
Valenzuela in Support of Plaintiffs'
Motions in Limine and attached exhibits
filed concurrently herewith]

Date: January 8, 2025

Time: 3:00 p.m.

Ctrm: 10B

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD AND**
2 **TO THIS HONORABLE COURT, PLEASE TAKE NOTICE** that on January
3 8, 2025 at 3:00 p.m. in the above-referenced court, Plaintiffs will and do hereby
4 move to exclude specific items of information at trial in this matter that were
5 acquired after the shooting, and not known to the shooting officer at the time of the
6 shooting, including:

7 (1) the results of the toxicology tests for Decedent at autopsy.

8 **Statement of Local Rule 7-3 Compliance:** This motion is made following
9 a conference of counsel during which no resolution could be reached.

10 Plaintiffs base their motion on this Notice of Motion and Motion, the
11 attached Memorandum of Points and Authorities, the Declaration of Eric
12 Valenzuela in Support of Plaintiffs' Motions in Limine and Exhibits attached
13 thereto, any Reply in Support of Plaintiffs' Motion in Limine; Plaintiffs'
14 [Proposed] Order, any argument raised at the hearing on this motion, and all other
15 pleadings and papers on file with this honorable court.

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17 Respectfully submitted,

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19 Dated: December 11, 2024

LAW OFFICES OF DALE K. GALIPO

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21 By _____ /s/ Eric Valenzuela
22 Eric Valenzuela
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Attorneys for Plaintiffs

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **PLAINTIFFS' MOTION IN LIMINE NO. 1 TO EXCLUDE AFTER-**
3 **ACQUIRED INFORMATION**

4 **I. INTRODUCTION**

5 This civil rights case involves the March 12, 2023 shooting death of Mr. Kyle
6 Sostek ("Decedent") by County of San Bernardino Sheriff's Deputy Samuel Fuller.

7 On Saturday, March 11, 2023, Big Bear Sheriff's Station personnel conducted
8 their pre-shift briefing. During the briefing, information regarding a felony arrest
9 warrant for Decedent was discussed. Sostek's arrest warrant indicated he was an
10 armed and dangerous parolee at large and drove a white Honda Civic.

11 On Sunday, March 12, 2023, at approximately 0157 hours, Deputy Fuller
12 located Decedent inside the Honda Civic near the intersection of Big Bear Boulevard
13 and Green Way, in Big Bear. Fuller initiated a traffic enforcement stop, Decedent
14 failed to yield, and a vehicle pursuit ensued. The vehicle pursuit continued for
15 approximately seven minutes, and terminated in a cul-de-sac on Vista Avenue, in the
16 community of Sugarloaf. Both Fuller and Sgt. John Everman were involved in the
17 vehicle pursuit. At the conclusion of the vehicle pursuit, a lethal force encounter
18 occurred, and Decedent was pronounced deceased at the scene.

19 It is undisputed that Decedent was unarmed at the time of the incident and that
20 Fuller never gave a verbal warning that deadly force would be used prior to shooting
21 Decedent. It is also undisputed that Decedent never physically touched Fuller or his
22 gun/equipment prior to the shooting. Further, Decedent never verbally threatened
23 any of the officers and the belt recorder captures Decedent telling Fuller that he just
24 wants to talk to him shortly before the shooting begins. It is also undisputed that
25 Decedent never attempted to punch or kick any of the deputies and there were also
26 two deputies on scene to deal with one unarmed individual and there was less than
27 lethal options, including the taser in Everman's hand, OC spray and batons. In fact,

1 Everman already had pulled his taser out and was prepared to use it on Decedent,
2 when Fuller began to fire his gun.

3 Obviously, at the time of the shooting Fuller did not know the toxicology
4 results performed during the autopsy.

5 This motion in limine is intended to exclude evidence that Defendants
6 acquired after the fact and that was unknown to Fuller at the time of the shooting,
7 and therefore cannot be taken into consideration under a totality of the circumstances
8 analysis to determine whether the use of deadly force was reasonable or not.
9 Specifically, the Decedent's toxicology results.

10 **II. THE U.S. SUPREME COURT AND THIS CIRCUIT EXPRESSLY**
11 **PROHIBIT USING INFORMATION UNKNOWN TO THE OFFICERS AT**
12 **THE TIME OF THE SHOOTING (OR ACQUIRED AFTER THE FACT) TO**
13 **DETERMINE THE REASONABLENESS OF A USE OF FORCE**

14 In determining whether Deputy Fuller's use of deadly force was
15 unreasonable, only information which was known to the officer at the time of the
16 incident is relevant. In this Circuit, information not known to the officer at the
17 time of the shooting should not be taken into consideration. *See Hayes v. Cnty. of*
18 *San Diego*, 736 F.3d 1223, 1232-33 (9th Cir.2013) (holding that "we can only
19 consider the circumstances of which [the officers] were aware when they employed
20 deadly force.... Accordingly, when analyzing the objective reasonableness of the
21 officers' conduct under *Graham*, we cannot consider the fact that [the decedent]
22 was intoxicated or that he had previously used a knife in harming himself"). *Id.*
23 at 1232-33. This issue was also addressed by the Ninth Circuit in *Glenn v. Wash.*
24 *Cnty.*, 673 F.3d 864 (9th Cir.2011), which stated that "[w]e cannot consider
25 evidence of which the officers were unaware-the prohibition against evaluating
26 officers' actions 'with the 20/20 vision of hindsight' cuts both ways." *Id.* at 873 n.
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1 8 (citing *Graham*). Accordingly, in this Circuit, unknown, pre-shooting
2 knowledge is inadmissible to establish the reasonableness of an officer's conduct.

3 Further, in the Ninth Circuit, juries are instructed that they “must judge
4 the reasonableness of a particular use of force from the perspective of a reasonable
5 officer on the scene” at the time of the use of force “and not with the 20/20 vision
6 of hindsight.” *See* Ninth Circuit Model jury Instruction 9.25. The Ninth Circuit
7 Model Instruction for excessive force claims further informs the jury “in
8 determining whether the officer used excessive force in this case, consider all of
9 the circumstances known to the officer on the scene”. *See* Ninth Circuit Model
10 jury Instruction 9.25.

11 In light of how the jury will be instructed and given the great weight of
12 Supreme Court and Ninth Circuit authority on this issue, permitting the jury to
13 learn about facts and circumstances that Defendant Fuller was not confronted with
14 or that were otherwise unknown to him at the time he made the decision to use
15 deadly force against Decedent, would be improper. In addition, since this type of
16 evidence is not relevant to the jury’s reasonableness determination, any probative
17 value would be substantially outweighed by the risk of unfair prejudice that the
18 jury would rest its decision on an improper basis and judge the shooting with 20/20
19 hindsight. For these reasons and because the evidence is unduly prejudicial and
20 improper character evidence, evidence of Decedent’s toxicology results at autopsy,
21 which was not known to Fuller at the time of the shooting, should be excluded as
22 set forth below.

23 **III. THE COURT SHOULD EXCLUDE REFERENCE TO THE**
24 **TOXICOLOGY RESULTS AND ANY EVIDENCE OF PRIOR DRUG USE.**

25 It is anticipated that Defendants will attempt to introduce at trial information
26 contained in the coroner’s toxicology report completed after the incident, which
27 indicates that Decedent’s blood tested positive for methamphetamine and marijuana

1 after the shooting. Since this information was unknown to Fuller at the time of the
2 shooting, it in no way guided or informed Fuller's decision to use deadly force against
3 Decedent, and it is irrelevant to the *Graham* analysis and should be excluded.

4 The inference that Decedent would have been violent or specifically attempted
5 to harm the involved officers, including Fuller, during the incident because of the
6 Methamphetamine or marijuana later determined to be in his blood is a far reach and
7 too speculative. Moreover, evidence of a person's character or a trait of character is
8 not admissible for the purpose of proving action in conformity therewith on a
9 particular occasion.

10 Plaintiffs also anticipate that the defendants may attempt to introduce improper
11 character evidence related to Decedent, including statements made by Diane Bilodeau,
12 Decedent's tattoos and the conclusions of the toxicology report, which would be based
13 on nothing more than speculation. Since this evidence would also be improper
14 character evidence, it should be excluded pursuant to Rule 404 in addition to Rules
15 401, 402, and 403 of the Federal Rules Evidence.

16 **A. Drug Evidence is Irrelevant.**

17 Drug evidence is irrelevant to whether it was objectively reasonable for
18 defendant to shoot Decedent. Defendant Fuller does not claim to have shot
19 Decedent because he was under the influence of drugs (which of course the
20 Defendants did not know at the time). The jury must make this reasonableness
21 determination based on relevant witness testimony, not with improper "hindsight"
22 evidence. This is important so as not to mislead the jury into a verdict supported
23 by bias and consideration of irrelevant evidence and unduly prejudicial.

24 To the extent Defendants may argue that the drug evidence may bear on
25 Decedent's state of mind, his subjective state of mind is not at issue—rather, the
26 issue is whether the shooting was objectively reasonable under the circumstances
27 Defendants confronted. *Graham*, 490 U.S. at 397. Just as the involved officers
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1 subjective underlying intent or motivation is not relevant in determining the
2 reasonableness of his use of force. See *Price v. Sery*, 513 F.3d 962, 967 (9th Cir.
3 2008), citing, *Graham v. Conner*, 109 S. Ct. 1865, 1872-73 (1989). Moreover,
4 Decedent's alleged drug use is also irrelevant to any damages issues in this case.
5 *Mason v. City of Chicago*, 641 F.Supp.2d 726, 730 (N.D. Ill. 2009) (in Section
6 1983 action, "any evidence regarding alleged drug use is not probative to the issue
7 of damages, as such evidence does not touch on the value of [plaintiff's] life")
8 (internal quotations omitted). It would be pure speculation that a person's alleged
9 use or possession of drugs on isolated occasions would make it less likely that the
10 individual would be able to provide the same love and comfort in the future as a
11 person who did not.

12 Further, the evidence cannot be used to show Decedent's character or that he
13 acted or will act in conformity therewith. *Palmerin v. Riverside*, 794 F.2d 1409,
14 1414 (9th Cir. 1985) ("The federal rules bar the use of any circumstantial evidence
15 that requires an inference of a person's character to make it relevant....").
16 Admission of this evidence would be nothing more than a backdoor attempt to
17 tarnish Decedent's character and pollute the jury against Decedent and Plaintiffs.

18 Further, any evidence relating to Decedent's prior alleged drug use would
19 constitute inadmissible hearsay in violation of Rule 802, and improper character
20 evidence in violation of Rule 404. Therefore, any evidence regarding the
21 toxicology results at autopsy are irrelevant and should be excluded in the entirety
22 from trial.

23 **B. Drug Evidence is Unduly Prejudicial.**

24 Alternatively, the evidence of the toxicology results are unduly prejudicial
25 and misleading and should be excluded under Rule 403. Rule 403 excludes
26 relevant evidence "if its probative value is substantially outweighed by the danger
27 of the unfair prejudice, confusion of the issues, or misleading the jury, or by

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1 considerations of undue delay, waste of time, or needless presentation of
2 cumulative evidence.” “Unfair prejudice” means “undue tendency to suggest
3 decision on an improper basis, commonly, though not necessarily, an emotional
4 one.” *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000); *Larez v. City*
5 *of Los Angeles*, 946 F.2d 630, 642 n.5 (9th Cir. 1991) (noting that evidence is
6 likely to inflame the jury if it tends to evoke a juror’s anger or punitive impulses).

7 Evidence of drug use can only serve to unjustly inflame a jury’s passions
8 and prejudices against a party—here, decedent and plaintiff. *See Gregory v.*
9 *Oliver*, 2003 WL 1860270, at *2 (N.D. Ill. Apr. 9, 2003) (granting a motion in
10 limine in an excessive force case to exclude drug paraphernalia the officers
11 discovered after the alleged excessive force occurred, because it was irrelevant and
12 unduly prejudicial under Rule 403); *id.* at *1 (“In today’s climate, any evidence as
13 to a litigant’s use of drugs has an obvious potential for being extraordinarily
14 prejudicial—for creating the prospect of deflecting the factfinders’ attention from
15 the matters that are really at issue in the case to everyone’s universally-shared
16 concerns as to the problems that drug usage is creating for our society.”); *Kunz v.*
17 *DeFelice*, 538 F.3d 667, 676-77 (7th Cir. 2008) (affirming district court’s ruling
18 that barred “use of the word ‘heroin,’ because at the time of the arrest, the officers
19 did not know the nature of the drug or Kunz’s usage and because mention of heroin
20 would be more prejudicial than helpful”); *Jackson v. City of Gahanna*, 2011 WL
21 587283, at *5 (S.D. Ohio Feb. 9, 2011) (“Allowing evidence of the illegal items
22 seized from the Plaintiff on February 25 would undermine the protections of the
23 Fourth Amendment by permitting the jury to infer that the Plaintiff’s culpability or
24 status as a presumed drug dealer justify the Defendant’s use of force against
25 him.”); *Wisler*, 2008 WL 2954179, at *5 (excluding evidence of marijuana use on
26 grounds it was unduly prejudicial because not known by Defendants); *Wiersta v.*
27 *Heffernan*, 789 F.2d 968, 972 (1st Cir. 1986) (“Convictions for possession of a
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1 syringe and hypodermic needle and possession of heroin . . . are unquestionably
2 highly prejudicial."); *Wilson v. Union Pacific R. Co.*, 56 F.3d 1226, 1231 (10th Cir.
3 1995) ("Evidence of a conviction for drug possession alone . . . can be highly
4 prejudicial and arouse jury sentiment against a party-witness."); *cf. Rascon v.*
5 *Hardiman*, 803 F.2d 269, 278 (7th Cir. 1986) (affirming exclusion of decedent's
6 mental health history, even though officers knew about his past suicide attempt and
7 mental illness history and argued it justified their actions in subduing him, because
8 of danger jury would conclude subduing was reasonable based on status rather than
9 conduct at the time); *Mason*, 631 F. Supp. 2d at 1060-61 ("The question of whether
10 Plaintiff smoked a marijuana cigarette three hours before the incident is no more
11 probative than whether the officers drank coffee before the incident. The
12 introduction of expert testimony or testimony concerning facts unrelated to the
13 physical encounter would merely divert the jury from the relevant inquiry...
14 Marijuana plays no part in this inquiry and the introduction of such evidence serves
15 no purpose other than to make a general character attack on Plaintiff."). The
16 inflammatory drug evidence is therefore likely to mislead or confuse the jury into
17 reaching a verdict that reflects its consideration of decedent's drug use as a reason
18 justifying the use of force or limiting plaintiffs' damages on an improper basis.

19 Admission of such evidence also poses a substantial risk of leading to
20 "litigation of collateral issues, thereby creating a side issue which might distract
21 the jury from the main issues." *Blancha v. Raymark Industries*, 972 F.2d 507, 516
22 (3d Cir. 1992); *Rockwell v. Yukins*, 341 F.3d 507, 513 (6th Cir. 2003) (*en banc*);
23 *Arlio v. Lively*, 474 F.3d 46, 53 (2d Cir. 2007). The central factual dispute in this
24 case is whether Decedent posed an imminent threat of death or serious bodily
25 injury to Defendant Fuller when he was shot. Refuting the inferences that
26 Defendants may attempt to raise Decedent's alleged drug use will necessitate a
27 mini-trial on collateral issues that have nothing to do with the central factual

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1 dispute. As a result, it will unduly consume this Court's and the jury's time, as
2 well as the calling of several potentially unnecessary witnesses. Accordingly,
3 Plaintiffs respectfully request that the Court exclude evidence and argument
4 regarding the toxicology results at autopsy under Rule 403. In the alternative, in
5 the event the Court finds that the toxicology results are relevant with regards to
6 damages only¹, Plaintiffs would ask that liability and damages be bifurcated.

7 | IV. CONCLUSION

8 For the foregoing reasons, Plaintiffs respectfully request that this Court exclude
9 the following evidence and information that was acquired after the shooting and not
10 known to the shooting officer at the time of the shooting, including:

11 (1) the results of the toxicology tests for Decedent at autopsy.

13 || Respectfully submitted,

DATED: December 11, 2024 LAW OFFICES OF DALE K. GALIPO

By _____ /s/ Dale K. Galipo
Dale K. Galipo
Eric Valenzuela
Attorneys for Plaintiffs

¹ It is anticipated that Defendants will argue that the drug evidence is relevant as to the pre-death pain and suffering Decedent experienced after being shot.